

June 22, 2001

PROCUREMENT MEMORANDUM 2001-02

MEMORANDUM FOR: Heads of Contracting Offices

FROM: Michael S. Sade
Director for Acquisition Management
and Senior Procurement Executive

SUBJECT: Interim Acquisition Guidance on Acquiring Electronic and Information Technology (Section 508)

The purpose of this memorandum is to provide interim acquisition guidance on the new Federal Acquisition Regulation on Electronic and Information Technology (EIT) and information on how the Department is implementing it at this point.

This guidance is in 4 parts:

1. Attachment A - Analysis of the Final FAR EIT Rule (FAC 97-27)
2. Attachment B - Frequently Asked Questions (FAQs), published June 20, 2001, by the Section 508 Inter-agency Steering Committee
3. Attachment C - DOC's Acting CIO's June 8, 2001 Guidance to CIOs entitled "Department of Commerce Electronic and Information Technology Accessibility Policy"
4. Attachment D - DOC's Interim Acquisition Guidance: Acquisition of Electronic and Information Technology (June 21, 2001)

Federal Acquisition Circular (FAC) 97-27 was published in the Federal Register on April 25, 2001. This final rule amends the Federal Acquisition Regulation (FAR) to implement Section 508 of the Rehabilitation Act of 1973 (the Act). Subsection 508(a)(3) of the Act requires the FAR to be revised to incorporate standards developed by the Architectural and Transportation Barriers Compliance Board (also known as the Access Board). It requires that when Federal agencies develop, acquire, maintain or use Electronic and Information Technology (EIT), they must ensure that the EIT allows Federal employees with disabilities to have access to and use of information and data that is comparable to the access to and use of information and data by other Federal employees. It also requires that individuals with disabilities, who are members of the public seeking information or services from a Federal agency, have access to and use of information and data that is comparable to that provided to the public without disabilities.

This FAR rule, which is effective June 25, 2001, significantly impacts how the Federal government will acquire EIT under contract. Requirements officials (i.e., the officials in the program office or organization that is funding and acquiring the EIT) are now responsible for many things, such as conducting advance market research, identifying applicable Access Board standards in their requirements documents, preparing documentation and recommending/making key determinations. Contracting

officials are expected to assist by pursuing effective strategies for acquiring EIT. The Department's Chief Information Officer, through the Commerce Section 508 Coordinator and counterparts in the operating units, is responsible for coordinating, providing policy, technical support and guidance, and reporting to the Justice Department on Section 508 issues. The Office of Acquisition Management is responsible for providing acquisition guidance on EIT. The Office of General Counsel's Contract Law Division is responsible for providing legal assistance to Departmental procurement offices in planning for and acquiring EIT

We expect this guidance will be supplemented in the near future with more specific policy for contracting officials and purchase card holders. Although many questions still remain about how Section 508 will be implemented at Commerce and across the federal government, we expect Department personnel to make every effort to comply with the requirements.

Because there is important information and context in the "preamble," we suggest you access the Federal Register version of the FAR rule –which contains both the preamble and the rule. You may link to it from the Section 508 FAQs document or you may download it from the Government Printing Office's GPO Access program at http://www.access.gpo.gov/su_docs .

This memorandum was coordinated with the Office of the Chief Information Officer and the Office of General Counsel. It is being transmitted to personnel on the DOC Acquisition Community Listserv and will be posted shortly to Office of Acquisition Management's website at <http://oamweb.osec.doc.gov/> .

Questions regarding this procurement memorandum may be directed to Nancy Barrere at Nbarrere@doc.gov.

Attachments A-D

cc: CFO/ASA Directors

ATTACHMENT A
Procurement Memorandum 2001-02

ANALYSIS OF
FEDERAL ACQUISITION CIRCULAR FAC 97-27
FEDERAL ACQUISITION REGULATION
ELECTRONIC AND INFORMATION TECHNOLOGY ACCESSIBILITY

Discussion

This final rule, effective June 25, 2001, amends the Federal Acquisition Regulation to implement Section 508 of the Rehabilitation Act of 1973 ("the Act"). Subsection 508(a)(3) of the Act requires the FAR to be revised to incorporate standards developed by the Architectural and Transportation Barriers Compliance Board (also known as the "Access Board").

The Act requires that when Federal agencies develop, acquire, maintain, or use Electronic and Information Technology (EIT), they must ensure that the EIT allows Federal employees with disabilities to have access to and use of information and data that is comparable to the access to and use of information and data by other Federal employees. It also requires that individuals with disabilities, who are members of the public seeking information or services from a Federal agency, have access to and use of information and data that is comparable to that provided to the public without disabilities. Failure of an agency to acquire EIT that complies with the standards may result in an individual with a disability filing a complaint alleging that a Federal agency has not complied with the standards. Individuals may also file a civil action against an agency. However, comparable access is not required if it would impose an undue burden on the Federal agency.

The Access Board published standards setting forth a definition of EIT and the technical and functional performance criteria necessary for accessibility for EIT on December 21, 2000. Those standards are codified at 36 CFR part 1194. This final rule implements the Access Board's standards by –

- Including the definition of the term “electronic and information technology” in FAR Part 2;
- Incorporating the EIT standards in acquisition planning, market research, and when describing agency needs; and,
- Adding a new Subpart 39.2, Electronic and Information Technology, which provides procedural guidance.

The rule requires that contractors interested in selling EIT supplies or services to the Federal Government comply with the standards. For many contractors, this may only involve a review of the supply or service with the standards to confirm compliance. For others, these standards could require redesign of a supply or service before it can be sold to the Federal Government.

Specific Requirements

- FAR Part 2 is revised by adding a definition of EIT. The definition has the same meaning as “information technology” but also includes the following: any equipment or interconnected system or subsystem of equipment that is used in the creation, conversion or duplication of data or information; telecommunication products, such as telephones; information kiosks and transaction machines; worldwide websites; multimedia; and office equipment, such as copiers and fax machines.
- FAR Part 7 is revised to require that acquisition planners specify needs and develop plans, drawings, work statements, specifications, or other product descriptions that address the applicable accessibility standards.
- FAR Part 10 is revised to require that requirements offices prepare procurement requests for EIT that comply with the applicable accessibility standards.
- A new Subpart 39.2 is added on EIT. This subpart:
 - Provides a website reference for further information on Section 508. That website is <http://www.section508.gov>
 - Defines “undue burden” as a significant difficulty or expense.
 - Clarifies that under indefinite-quantity contracts, this FAC applies to delivery or task orders issued on or after the effective date, except for requirements that are to be satisfied by initial award. Indefinite-quantity contracts may include noncompliant items, provided that any task or delivery order issued for noncompliant EIT meets an applicable exception.

Contracting officers that award indefinite-quantity contracts must indicate to ordering offices which supplies and services the contractor indicates as compliant, and show where full details or compliance can be found (e.g., vendor’s or other exact web page locations).

Exceptions

The following are exempt from the accessibility standards at 36 CFR Part 1194:

- Items ordered prior to the effective date of this rule which may be delivered after the effective date;
- Within scope modifications of contracts awarded before the effective date of this rule;
- Unilateral options for contracts awarded before the effective date of this rule;
- Multiyear contracts awarded before the effective date of this rule;
- Micro-purchases, prior to January 1, 2003. However, contracting officers and purchase

card holders are strongly encouraged to comply with the applicable accessibility standards to the maximum extent practicable.

- EIT for a national security system;
- EIT acquired by a contractor incidental to a contract (contractor employees in their professional capacity are not members of the public for purposes of section 508);
- EIT located in spaces frequented only by service personnel for maintenance, repair, or occasional monitoring of equipment; and;
- EIT that would impose an undue burden on the agency. To determine whether compliance with all or part of the applicable accessibility standards would be an undue burden, an agency must consider the difficulty or expense of compliance and the agency resources available to its program or component for which the supply or service is being acquired. It is the responsibility of the requirements office, not the acquisition office, to document, in writing, the basis for an undue burden decision and provide the documentation to the contracting officer for inclusion in the file.

Exception determinations are required prior to contract award, except under indefinite-quantity contracts. (NOTE: See CIO's June 8, 2001 memo for additional approvals at Commerce).

Commercial Items

When acquiring commercial items, an agency must comply with those accessibility standards that can be met with supplies or services that are available in the commercial marketplace in time to meet the agency's delivery schedule. An undue burden determination is not required to address individual standards that cannot be met with supplies or services available in the commercial marketplace in time to meet the agency's delivery requirements. In these cases, however, the requirements official must document in writing the nonavailability, including a description of the market research performed and which standards can be met, and provide the documentation to the contracting officer for inclusion in the contract file.

No FAR clauses are added or revised as a result of this rule.

ATTACHMENT B
Procurement Memorandum 2001-02

Acquisition of Electronic and Information Technology
Under Section 508 of the Rehabilitation Act
Frequently Asked Questions (FAQs)
(Published June 20, 2001, by the Section 508 Inter-agency Steering Committee)

To view or print these FAQs, please visit the Section 508 website at <http://www.section508.gov> and click on Frequently Asked Questions (FAQs). We suggest you print the FAQs for review and ready reference (about 15 pages).

ATTACHMENT C
Procurement Memorandum 2001-02

Memorandum From Thomas N. Pyke, Jr (Acting DOC CIO)
to Chief Information Officers
Subject: Department of Commerce Electronic and Information
Technology Accessibility Policy
(Issued June 8, 2001)

MEMORANDUM FOR: Chief Information Officers

FROM: Thomas N. Pyke, Jr.
Acting Chief Information Officer

SUBJECT: Department of Commerce Electronic and Information Technology
Accessibility Policy

The attached policy addresses the information technology aspects of Section 508 of the Rehabilitation Act as revised in 1998. This policy has been developed and concurred in by the Section 508 Coordinators from your respective organizations. The electronic and information technology standards implementing Section 508 become effective June 21, 2001.

Please note that the policy strongly suggests that each operating unit develop an Assessment Plan, addressing existing Web pages and software applications. While it is not required, an Assessment Plan would provide an organized approach to identifying and dealing with the software assets of our organizations. Should you elect to prepare an Assessment Plan, this will satisfy your obligation to certify Web accessibility according to Standard 6 developed by the Web Resources Group.

This policy will be made part of the Department of Commerce Information Technology Management Handbook which will be available from the DOC Web site. The electronic copy that is being sent to you today contains references to bookmarks and link information that will be transparent once the policy is on the Web.

Attachment

cc: Mike. Sade, OAM
Jim Taylor, OFM
Commerce 508 Coordinators

NOTE: The OCIO's EIT policy is now posted on their website at <http://www.doc.gov/cio/oipr/eitpolicy.htm> . Please note that the policy is expected to be updated periodically.

ATTACHMENT D
Procurement Memorandum 2001-02

**Interim OAM Acquisition Guidance on Acquiring
Electronic and Information Technology
under Section 508 of the Rehabilitation Act
(June 22, 2001)**

Pending issuance of more detailed guidance to contracting officers and purchase card personnel, we suggest that our contracting community take the following steps to familiarize themselves and their customers with Section 508 requirements for EIT.

First: Get Familiar with the FAR Rule. Read and Retain Federal Acquisition Circular FAC 97-27, including the “preamble” portion contained in the Federal Register version and review the FAC analysis in Attachment A. The rule’s “preamble” is important because it includes information that clarifies some aspects of the rule.

Second: Carefully Review the Interagency Section 508 Steering Committee’s FAQs and Retain for Reference. These Frequently Asked Questions (Attachment B) were just released on 6/20/01, and besides the Access Board and FAR Rules, they are the closest thing to “official policy” out there. They are also posted on the Section 508 website at <http://www.section508.gov> and will be updated periodically.

These FAQs are an excellent starting point for acquisition professionals and their customers. They are organized as follows:

A. Introduction - This part describes what Section 508 is; what it requires; what types of actions it covers, and; what the implementing rules provide (i.e., Access Board Standards and the FAR Rule)--complete with hotlinks to the rules.

B. Key Terms - This part covers topics such as what is Electronic and Information Technology (EIT); Is EIT limited to products; what is Comparable Access and Equivalent Facilitation; How does an agency proceed in identifying “applicable” technical provisions in the Access Board’s standards; what is the difference between Equivalent Facilitation and Alternative Means of Access; what is Assistive technology; and what is (commercial) Nonavailability and Undue Burden.

C. Roles and Responsibilities - This part addresses questions such as who within the agency is responsible for ensuring EIT purchases comply with Section 508; when acquiring EIT through another agency’s contract, which agency is responsible for Section 508 compliance; and what manufacturing requirements Section 508 imposes on contractors. (NOTE: At Commerce, the CIO and operating unit CFOs have a role in approving exceptions and making undue burden determinations; see Attachment 3)

D. Defining Requirements for EIT - This covers questions such as how does Section 508 affect the requirements development phase of an acquisition; which Access Board provisions and criteria must be addressed when purchasing EIT; whether agencies may buy EIT that does not meet all applicable technical provisions, and; whether an agency is required to fundamentally alter its needs to comply with Section 508.

E. The Acquisition Process - The part addresses questions such as what steps does the FAR require an agency to take when acquiring EIT (primarily in terms of requirements/program office and contracting officer responsibilities... but per CIO's memo, remember DOC's CIO role in exceptions and undue burden determinations); how Access Board standards figure into a best value "trade-off" source selection process; issues to consider when drafting a solicitation to acquire EIT, including sample evaluation language that might be used or adapted for solicitations (Section M) and; and testing process for Section 508 and websites for manufacturer information.

F. Nonavailability - The part covers questions like under what circumstances may an agency conclude no EIT is commercially available to meet the Access Board's technical provisions; how the nonavailability determination must be documented by the requirements official for the contracting officer for inclusion in the contract file (Note: Neither the CIO nor CFO are part of this process, but for Justice Department reporting purposes, a copy of nonavailability determinations should be sent to the operating unit's Section 508 Coordinator).

G. Exceptions - This part addresses issues such as what the exceptions are to the Section 508 requirements, including the temporary micro-purchase (under \$2,500) exception and acquisitions conducted with the purchase card; the national security exception; the "incidental to a contract" exception; the "back office" exception; the "undue burden" exception, including suggested documentation to support it; whether procurement actions to maintain existing legacy systems (that don't meet technical Access Boards standards) are exempt and may be included; status of JWOD, NIB/NISH, and UNICOR acquisitions under Section 508 and; tracking and reporting documented exceptions to Section 508 and nonavailability determinations. (At Commerce, in addition to the contract file copy, your Section 508 coordinator will retain a copy of exceptions).

H. Applicability - This part addresses issues such as when Section 508 requirements go into effect and what actions are covered; what an agency must do if it already has published a solicitation for EIT without taking section 508 requirements into account and the resulting contract will not be awarded until on or after June 25, 2001.

Third: Review the OCIO's June 8, 2001 memo "Department of Commerce Electronic and Information Technology Accessibility Policy (Section 508)" and Retain for Reference. This memorandum is included as Attachment C.

Based on OAM's review of the memorandum, many issues are covered, but of immediate significance to the acquisition community are:

- a. Section 508 Exceptions - The CIO (either at the Departmental or Operating Unit Level), approves exceptions to the Section 508 standards (see pp.5-6; "Who approves exceptions to the Section 508 standards"). No format or content requirement is specified.
- b. Undue Burden Determinations - The CIO (either at the Departmental or Operating Unit Level), will review and evaluate "undue burden" requests and decide whether to sign a "determination of undue burden" (pp 9-10; "What is the Undue Burden Determination request process at the Department level?"). Undue burden requests referred by operating unit CIOs to DOC's CIO must include concurrence from the operating unit's CFO (p.10; "What is the Undue Burden Determination request process at the operating unit level?"). Both the Department's and operating EIT Accessibility Coordinators (aka as Section 508 Coordinators) are responsible for retaining undue burden determination/documentation. (p.6 "What is the role of the Department regarding EIT accessibility?" and pp 6-7 "What must operating units do to comply with Commerce EIT accessibility policy?"). No format or content requirement is specified. Please refer any questions to your operating unit 508 Coordinator.

Fourth: When procuring EIT, work closely with your customer, your Section 508 Coordinator, and your OGC contracts counsel. Implementation of Section 508 imposes significant new responsibilities, particularly on our customers--the requirement officials. Working with your Section 508 Coordinator and legal counsel, contracting officers can help facilitate the learning process. Remember: There will be a learning curve and there will be many questions.

Fifth: Consider the Following Sample Contract/Solicitation Language When Acquiring EIT

DOC is on record as supporting government-wide Section 508 implementation via uniform FAR provisions and clauses. However, at present, there are no Section 508 provisions or clause in the FAR. Contracting officers may wish to consider using or adapting the following suggested language in their EIT contract documents. Please refer to Section 508 FAQs for more information.

a. For Section C - Description/Specifications/Statement of Work

The government needs to advise offerors and contractors that the Section 508 requirements apply to EIT acquisitions. The following sample language was developed by our Office of General Counsel: (Check the standards that apply)

Section 508 Accessibility (DOC OGC 6/21/01)

All Electronic and Information Technology (EIT), as defined at FAR 2.101, supplied under this contract, must conform to the Architectural and Transportation Barriers Compliance Board Electronic and Information Technology Accessibility Standards (36 CFR Part 1194). The applicable standards are available at <http://www.access-board.gov/sec508/508standards.htm>.

The following standards have been determined to be applicable to this contract:

- _____ 1194.21 Software applications and operating systems*
- _____ 1194.22 Web-based intranet and internet information and applications*
- _____ 1194.23 Telecommunications products*
- _____ 1194.24 Video and multimedia products*
- _____ 1194.25 Self contained, closed products*
- _____ 1194.26 Desktop and portable computers*

b. For Section M - Evaluation Factors for Award

Consistent with Section 508 FAQ E.4, agencies should consider drafting solicitations in a way that they may accept a product or service that partially meets the applicable technical provisions if no product is available that meets all applicable technical provisions; they should also indicate that products that provide equivalent facilitation will be considered along with those that meet the applicable specific technical standards of the Access Board standards. The following is from Section 508 FAQ E.4's "strawman" language (the title is ours):

Evaluation of Offers: EIT Acquisitions (from Section 508 FAQ E.4 6/20/01)

To be considered eligible for award, offerors must propose goods and/or services that meet the applicable provisions of the Access Board's standards as identified by the agency. Alternatively, offerors may propose goods and/or services that provide equivalent facilitation. Such offers will be considered to have met the provisions of the Access Boards's standards for the feature or component providing equivalent facilitation. If none of the offers that meet all applicable provisions of the Access Board's standards could be accepted without imposing an undue burden upon the agency or component, or if none of the offerors propose goods or services that fully meet all of the applicable Access Board's provisions, those offerors whose products or services meet some of the applicable provisions will be considered eligible for award. Award will not be made to an offeror meeting all or some the applicable Access Board provisions if award would impose an undue burden on the agency.

Sixth: Use Available Section 508 Resources

- a. List of Commerce Section 508 Coordinators - The List of Department of Commerce 508 Coordinators is located at <http://www.doc.gov/cio/oipr/508Coordinators.htm> . As of June 20, 2001, we are advised there are 2 changes not yet reflected on the list: The NIST coordinator is now Dan Benigini, dbenigni@nist.gov ; Census's is Roger Brown, Roger.D.Brown@census.gov. These individuals can assist you and your customers in implementing Section 508 requirements.
- b. Federal Section 508 website - Use and refer your customers to the Section 508 website at <http://www.section508.gov>. There's much useful information here.
- c. Questions - Please try to resolve your Section 508 questions first at the operating unit level. If you still need assistance, please refer acquisition related questions to Nancy Barrere, in the Office of Acquisition Management. Nbarrere@doc.gov Similarly, refer non-acquisition questions to Diana Hynek, in the Office of the Chief Information Officer. Dhynek@doc.gov.